

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHAREN PROSSER
Claimant

VS.

EMERSON ELECTRIC COMPANY
Respondent
Self-Insured

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Docket No. 244,902

ORDER

Claimant appeals from the July 29, 1999, preliminary hearing Order of Administrative Law Judge John L. Frobish. The Administrative Law Judge denied claimant benefits, finding claimant had failed to prove accidental injury arising out of and in the course of her employment and timely notice of accidental injury.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment on the dates alleged?
- (2) Did claimant provide respondent timely notice of the accident pursuant to K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds as follows:

Claimant alleges accidental injury between February 23, 1999, and March 2, 1999, while working the whistling line job for respondent. This line required that claimant pick up metal plates weighing approximately one pound each and feed them into a machine which punched holes in them. Claimant would have to assemble approximately 15 plates at a time which she would then load into a box or crate. Claimant estimated she handled approximately 3,000 pieces of metal per day.

Claimant, a twelve-and-a-half-year employee with respondent, normally worked as an inspector on the paint line. However, respondent's plant was closing, and job responsibilities were being shifted daily. During the week of February 22, 1999, claimant was moved temporarily to the whistler line. She worked that line all of one day and part

of two other days, with claimant testifying that she worked on the whistler line on Monday, Wednesday and Friday. Her testimony, however, does not indicate which was the full day and which two were the partial days.

Claimant stated she did not feel pain while doing the whistler job but simply felt uncomfortable. She returned to work on Monday, March 1, 1999, feeling twinges. Claimant testified that her back pain became worse, even though she was not working the whistler job on March 1. She worked only part of the day and left work in order to go to her personal physician, Robert M. Osborn, D.O., in Independence, Kansas. Dr. Osborn first examined claimant on March 1, 1999, however, his medical reports from that date were not provided for the Court's review. Dr. Osborn's report of March 29, 1999, is, however, part of the evidentiary record. In that report, Dr. Osborn discusses claimant being on a different job for a couple of days before the pain started, but claimant did not associate that job directly with her pain. The work history provided to Dr. Osborn indicated claimant lifted approximately 30 pounds up to 3,000 times a day. It indicated claimant had been performing this type of physical, heavy labor for a number of years. The job description provided by claimant at the preliminary hearing is substantially different than the history provided Dr. Osborn.

After a period of conservative care, claimant was referred by Dr. Osborn to Dr. Kenyon Kugler, a neurologist in Tulsa, Oklahoma. Dr. Kugler's medical notes, beginning with his March 24, 1999, office note, are contained in the record. In that note, Dr. Kugler discusses claimant's onset of back pain of approximately March 1, 1999, as having occurred at the whistling job, which was described to Dr. Kugler as requiring "repeated lifting of heavy steel objects." Again the history provided is substantially different than the history provided by claimant at the preliminary hearing. Both Dr. Kugler and Dr. Osborn associate claimant's pain complaints with the heavy lifting required in her job.

Claimant testified that, after having seen Dr. Osborn on March 1, 1999, she returned to work and discussed her back problems with Julie Hastings, the plant nurse, and Bobbie Johns in the human resources department. The record does not specify whether claimant advised Ms. Hastings or Mr. Johns of a work-related connection to this pain. Apparently respondent advised claimant that this appeared to be a non-work-related situation and confirmed that claimant could continue treatment with her personal doctor. No accident report was prepared, and claimant did not request authorized medical care from respondent, but continued with her personal physicians, Dr. Osborn and Dr. Kugler.

On cross-examination, respondent questioned claimant about her multiple, prior workers' compensation cases. Claimant had filed and litigated four prior workers' compensation claims, three with respondent, all of which were settled for lump sum settlements. Claimant had prior carpal tunnel claims and prior low back claims. Claimant apparently provided proper notice of those prior injuries.

In proceedings under the Workers Compensation Act, it is claimant's burden to establish the claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g). In this instance, the Administrative Law Judge, after reviewing claimant's testimony and medical reports, found claimant had failed to prove accidental injury and failed to prove timely notice. Both hinge almost entirely upon claimant's credibility, as claimant was the only witness to testify in this matter. The only contradictory evidence to claimant's testimony is in the medical reports of Dr. Osborn and Dr. Kugler, and ultimately in claimant's own testimony.

The Administrative Law Judge had the opportunity at the preliminary hearing to observe claimant's testimony. The Administrative Law Judge apparently found claimant's testimony to be lacking and denied claimant benefits under the Workers' Compensation Act. The Appeals Board, in reviewing claimant's testimony and the medical records of both Dr. Osborn and Dr. Kugler, finds serious questions regarding both how claimant's accident may or may not have occurred and what information claimant may have provided to respondent and when. The indication is claimant did not allege a work-related connection to her pain until after she was examined by Dr. Kugler on March 24, 1999, nearly a month after the alleged series of accidents. In addition, the histories provided to Dr. Kugler and to Dr. Osborn, regarding the physical requirements of claimant's job, appeared grossly inaccurate when compared to claimant's preliminary hearing description of her job duties on the whistler line. In reviewing the evidence, the Appeals Board cannot find that claimant has carried her burden regarding either accidental injury or timely notice.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated July 29, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

c: Robert W. Lattin, Independence, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director